FILED
APR 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1250

AMERICAN GUILD OF VARIETY ARTISTS,
Petitioner,

against

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, American Guild of Variety Artists, hereby respectfully requests this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the order of that Court entered December 13th, 1966 denying rehearing of the judgment of that Court entered on November 18, 1966, re-adopting and re-affirming its prior opinion upon remand by a prior Writ of Certiorari granted by this Court on April 18, 1966, vacating a judgment of the United States Court of Appeals for the Eighth Circuit entered on August 9, 1965, reversing a judgment of the United States District Court for the District of Minnesota which directed a verdict in favor of petitioner (defendant below) on one cause of action and granted judgment N.O.V. for the petitioner after a jury verdict in favor of respondent (plaintiff below) for $21,000 on a second cause of action. The time to file this petition for Writ of Certiorari was extended to and including April 12th, 1967.

Jurisdiction

The jurisdiction of this Court is invoked under §§ 1254(1) and 2101(c) of Title 28, United States Code.

Summary Statement of the Matter Involved

Background

Your petitioner, American Guild of Variety Artists (hereinafter referred to as AGVA) is a labor union whose members are performers in the variety field of entertainment, which field includes circus performers (T 916-917). AGVA maintains its National headquarters in New York City and branch offices throughout the Country. A branch office is maintained in Minneapolis, Minnesota, which branch covers parts of Wisconsin, Iowa, North Dakota, South Dakota and Canada (T 915).

The respondent, William Smith, was franchised by AGVA from 1957 to 1962 to produce shows and circuses employing only AGVA members (T 921 and T 6). Pursuant to his franchise, Smith agreed among other things, to:

1. Not to require any AGVA performer to work with any non-union performer or in violation of AGVA's rules.

2. Deposit adequate security with AGVA to cover wages and welfare contributions for performers.

3. To pay the performers' salaries on the job not later than the day following each weekly engagement.

4. To make welfare contributions weekly for each performer.

5. To engage performers on AGVA standard form contracts.

Prior to 1957, Smith had been in the concession business and a wrestler all his life (T 6).

In May of 1962, respondent set out with a troupe of AGVA members from Minneapolis on a circus tour scheduled through the provinces of Canada and on to Alaska. He did not post wage and welfare security with AGVA as required and at the time, had a total working capital of $2,100.00. The tour was beset with financial problems from its inception, respondent fell behind in wages due to the performers and on June 15, 1962, he abandoned the troupe in Edson, Alberta, owing approximately $20,000.00 in wages to AGVA members and for unpaid welfare contributions (T 292-302).

When the unpaid performers returned to Minneapolis, they registered a complaint with AGVA and the respondent was placed on the unions "unfair list" for non-payment of salaries due to its members and for his failure to make welfare contributions (T 965) and respondent was notified of this action against him.

Thereafter, with full knowledge that he had been placed on the union's "unfair list" and that AGVA would not permit its members to work for him until he had paid the back wages and welfare and would be required to post security for future wages, the respondent contracted to produce a circus at seventeen county fairs commencing with the Rice County Fair at Faribault, Minnesota, on July 28, 1962 (T 11-18).

In the later part of June, 1962, Smith was informed that he would have to pay the back wages (T 967-973) and deposit adequate wage security before AGVA would consent to its members performing in his projected circus at seventeen fairs. Nevertheless, respondent proceeded with his plans to produce a circus at the Rice County Fair at Faribault, Minnesota on July 28 and 29, 1962 with non-union performers.

The Basis of the Alleged Causes of Action

On or about July 23, 1962 (T 977) the AGVA Minneapolis Branch Manager Meyers and the respondent attended a meeting of the Rice County Fair Board at Faribault, Minnesota. Meyers told the Board of the unpaid salaries owed by respondent and that the union would not permit its members to perform for Smith.

In the evening of that day, another meeting was held and when it was opened, Meyers was asked to leave the meeting (T 980) and about three quarters of an hour later was called back into the meeting and was told that the Board's lawyers were going to let Mr. Smith put on the show. Respondent had stated that he would put on the show with non-union acts (T 521). Meyers informed the Board that if they went ahead with non-union acts, he would go to the Central Labor Union of Faribault, Minnesota to get permission to put up a picket line, which he did (T 980).

Meyers thereafter, on July 24, 1962, notified the seventeen county fair boards who had contracted with respondent that he had been placed on AGVA's unfair list and no union acts would be permitted to appear in his circus.

On July 26, 1962, while preparations were underway for the opening of respondent's circus with non-union acts, AGVA put up a picket line in the vicinity of the grandstand where the circus was to be held inside the fair grounds. There were from four to six pickets. They did not picket at the entrance to the fair grounds but only at the site where the circus was to perform.

The pickets carried signs reading as follows (T 982):

> "Do Not Patronize Circus at this Fair. Producer Unfair to A.G.V.A.—American Guild of Variety Artists, A.F.L.-C.I.O."

The picketing conducted was peaceful (T 471). It was conducted in the grandstand area through the afternoon

and evening of the 28th of July and ended in the morning of Sunday, July 29 (T 984).

Smith's circus, employing non-union performers, performed on Saturday afternoon, July 28, as scheduled (T 76), but after the initial performance, the Rice County Fair Board cancelled his contract and the remaining performances because it was not a good show and because it was too short, the respondent having committed himself for twenty acts and did not deliver (T 528-529).

Thereafter, the remaining sixteen County Fair Boards cancelled their contracts with the respondent.

The only affirmative action by AGVA with reference to the remaining sixteen county fair boards was a wire to them that respondent had been placed on their unfair list. The respondent himself released one of the fair boards, Preston County, from its contract (T 591). The Northwood, Iowa fair cancelled the respondent on their lawyer's advice (T 615). With reference to the remaining fourteen fair contracts, the respondent failed to produce evidence that AGVA was the cause of cancellation.

The respondent based his causes of action on (1) alleged violations of 29 U.S.C.A. § 158(b)(4)(ii) by secondary boycott and (2) alleged wrongful interference with the contractual relations between respondent and the seventeen county fair boards.

At the close of all the evidence, the Trial Court, on petitioner's motion, directed a verdict in favor of petitioner on the secondary boycott cause of action with a finding as a matter of law that the picketing was primary.

After verdict, the Trial Court ruled that this was a labor dispute within the meaning of 29 U.S.C.A. § 152 (9) hence the picketing was privileged and did not constitute a tortious interference with respondent's contract with the County Fair Boards. Judgment N.O.V. followed.

Questions Presented

(1) Was the United States Court of Appeals for the Eighth Circuit correct in its opinion on remand by the Supreme Court in its re-adoption and re-affirmation in all respects of its prior opinion reported at 349 F2d 975?

(2) Was the trial court correct in ruling, as a matter of law, that peace picketing against the primary employer in support of lawful union demands, in the area of a common situs where the primary employer is conducting his normal business, is primary, and on the strength of such a ruling, directing a verdict in favor of the petitioner on a cause of action for alleged secondary boycott under 29 U.S.C.A. § 187 and 29 U.S.C.A. § 158(b)(4)(ii)?

(3) Was the trial court correct in ruling, as a matter of law, that lawful primary picketing is not tortious interference with contract and, on the strength of such a ruling, granting judgment in favor of petitioner notwithstanding a jury verdict for $21,000 in favor of respondent on a cause of action for alleged wrongful interference with contract?

Specification of Errors

The United States Court of Appeals for the Eighth Circuit erred:

(1) In its re-adoption and re-affirmation in all respects of its prior opinion reported at 349 F2d 975.

(2) In reversing the order of the trial court at the close of all the evidence directing a verdict in favor of the defendant on the secondary boycott cause of action and the judgment entered thereon.

(3) In reversing the order of the trial court and the judgment entered thereon granting judgment N.O.V. to the defendant.

Reasons Relied Upon for Allowance of Writ

(1) In re-affirming and re-adopting in all respects its prior opinion (Appendix B) reported at 349 F2d 975, the United States Circuit Court for the Eighth Circuit has disregarded the direction of this Court for further proceedings in the light of *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715.

On April 18, 1966, in *American Guild of Variety Artists* v. *Smith*, 384 U. S. 30, the Supreme Court granted certiorari, vacated the judgment of the Court of Appeals for the Eighth Circuit and remanded the cause in an opinion which stated:

> "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that Court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, No. 243, October Term, 1965, decided March 28, 1966."

Petitioner respectfully submits that the Circuit Court of Appeals for the Eighth Circuit erred in its detailed consideration of § 6 of the Norris-La Guardia Act, and in addition has substantially ignored other and most compelling mandates of this Court set forth in *Gibbs* which directly relate to the case at hand.

The verdict herein, was based upon the tortious interference with contractual relations, the state remedy.

In *Gibbs*, part II of the opinion (pp. 729-735), this Court in detail explored the scope of state remedies in this area of the law which is pre-empted by federal labor legislation. In treating this problem, this Court has required that more than peaceful picketing is necessary to call into effect state remedies. To permit a state to rise above federal pre-emption of this field of labor law, action inimical to the state's interest must be clearly present and the action referred to is violence. In the case before us, the element of

violence is totally lacking and the Court of Appeals for the Eighth Circuit has overlooked this necessary ingredient in its opinion on remand.

(2) The refusal of the Court of Appeals for the Eighth Circuit, upon remand, to consider § 6 of the Norris-La Guardia Act, 29 U.S.C. 106, is contrary to the direction of this Court. Most certainly, the Supreme Court found that its holdings in *Gibbs* were sufficient to merit vacating the judgment of the Court of Appeals for the Eighth Circuit. The burden imposed upon plaintiff-respondent by the rule of *Gibbs* was clearly not met upon the trial. The fact that § 6 was not specifically raised can in no event alter the burden that existed at the trial which implicitly exists in all trials and proceedings of this nature. The charge of the Trial Court (T 1167) was not in conformity with § 6 of the Norris-La Guardia Act, nor was the burden of proof instruction (T 1166). *Gibbs* clearly indicates that "special proof requirements" are imposed by § 6 of the Norris-La Guardia Act (p. 735). An utter failure of proof cannot be upheld.

(3) The reversal by the Court of Appeals for the Eighth Circuit of the judgment of the District Court on the secondary boycott action is in contravention of the decisions of this Court relating to the application and meaning of 29 U.S.C.A. 187 and 29 U.S.C.A. 158(b)(4)(ii).

> *United Steel Workers of America* v. *N.L.R.B.*, 376 U.S. 492, 84 Sup. Ct. 899 (1964);
> *Local 761, International of E. R. & M. Workers* v. *N.L.R.B.*, 366 U.S. 667, 81 Sup. Ct. 1285 (1961).

The picketing in the case was at all times peaceful picketing. It was directed at a primary employer who had blatantly violated his franchise with the union. He had defaulted in payment of wages to his employees and had failed

to make required contributions to the welfare fund of the union in an amount of approximately $20,000.

By the plaintiff-respondent's own testimony, the picketing was confined strictly to the immediate area inside the fair grounds where his non-union circus was to perform (T 434). There were no pickets at either the front or rear entrances to the fair grounds (T 434). Had AGVA intended to exert pressure on the secondary employer, *i.e.*, the Fair Board, doubtless that pressure would have been exerted at the entrances to the Fair.

The record indicates that no effort was made by the union members to interfere with the business of the fair or to prevent anyone from entering or leaving the grandstand on July 26 and 27. The signs carried by the pickets referred only to the circus at the Fair (T 982).

A County Fair advertises in advance of its happening. It attracts the public to its fair grounds in advance. The circus to be held there was an attraction that would draw the public. It cannot be said that the picketing of the 26th and 27th of July, directly relating to the circus due to be presented on the 28th was illegal.

The legal persuasion of picketing could only be effective by its being conducted in advance of the actual non-union performance. To limit it to the time of the performance itself would render the entirely justifiable strike ineffective.

The circus was being advertised. Patronage was being solicited. Efforts were initiated to bring the public to see the performance. Most certainly, the union members had a right to exert their efforts to oppose the patronage of the non-union presentation. The proper place to picket was the site where the non-union performance was to be held and it was there and only there that the picket line was established and maintained.

In these circumstances, the union's action was a reasonable and lawful use of economic pressure directed against the primary employer, not the Fair Board, to compel him to live up to his collective bargaining agreement with the union.

The Fair Board cancelled the respondent's contract after one matinee performance because the show was not a good one and because respondent had breached his contract by producing only twelve acts instead of the twenty act circus he had contracted for (T. 528-529). The action of the Fair Board was not predicated on any action of the petitioner. In fact, despite the strike and before they had seen respondent's show, the Fair Board refused to cancel respondent's contract at the union's request and with knowledge that respondent was in violation of his collective bargaining agreement with the union. It was only after witnessing the performance of respondent's non-union show that the Fair Board cancelled. The cancellation could only be attributed to the quality of the show and its paucity of performers.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the District Court is set forth as Appendix A. The opinion of the Court of Appeals for the Eighth Circuit is set forth as Appendix B. The Order of the Supreme Court granting certiorari is set forth as Appendix C and the opinion of the Court of Appeals for the Eighth Circuit on remand is set forth as Appendix D. The Order of the United States Court of Appeals for the Eighth Circuit denying the petition for rehearing is set forth as Appendix E.

ARGUMENT

I

The re-adoption and re-affirmation by the United States Court of Appeals for the Eighth Circuit of its prior opinion after remand was erroneous in view of the decision of the Supreme Court in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715.

The Court of Appeals for the Eighth Circuit, in substance, held that § 6 of the Norris-La Guardia Act had not been considered in its prior opinion and the § 6 issue, raised for the first time on appeal, could be given no consideration. Such a holding is, on its face, in contravention of the direction of the Supreme Court on its remand that the judgment of the Court of Appeals was vacated and the cause remanded for further proceedings in light of *United Mine Workers of America* v. *Gibbs* (383 U.S. 715). The doctrine emanating from § 6 of the Norris-La Guardia Act is an integral part of the *Gibbs* case but not the only consideration applicable here.

The opinion of Mr. Justice Brennan in *Gibbs*, is in three parts, one referring to the claim based on state law, the second pertaining to the scope of state remedies and the third relating to the Norris-La Guardia Act.

The verdict herein, emanates from a finding of tortious interference with contractual relations, a state remedy. The scope of state remedies was part of this Court's decision in *Gibbs*. In treating this problem the Court considering that petitioner's position, with reference to the right of states to deal with malice and threats of violence in labor disputes, stated (p. 729):

> "Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences

> of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree."

This concept was totally ignored by the Court of Appeals for the Eighth Circuit.

In *San Diego Building Trades Council* v. *Garmon* (359 U.S. 236) where a California State Court was precluded from awarding damages to respondent under state law for economic injuries resulting from peaceful picketing, this Court stated (p. 246):

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 492-497. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.
>
> It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S.

> 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair,* 355 U.S. 131; *Auto Workers* v. *Wisconsin Board,* 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

Thus, it is clearly the law from *Gibbs* and *San Diego Building Trades Council* and the cases cited therein that something more than peaceful picketing is necessary to authorize the invocation of state remedies. To permit a state to rise above the Federal pre-emption of the field of labor law, something inimical to the state's interest must be present and must require the state's action. That factor has been uniformly held by this Court to be violence or a present actual danger of violence. *Allen-Bradley Local* v. *Wisconsin Board,* 315 U.S. 740; *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656; *United Automobile Workers* v. *Wisconsin Board* 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.* 355 U.S. 131.

This Court has specifically laid down this rule in *Gibbs* (p. 732):

> "Where the consequence of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter."

The record in the case at hand is replete with testimony that the picketing was peaceful and non-violent (T 705, 731, 544-545, 842 and 434) and the record is barren as to any testimony of violence by any of the pickets, a set of facts far more worthy than the facts in the *Gibbs* case.

In failing to consider this factor on remand, the Court of Appeals for the Eighth Circuit erred in its opinion and did not conform to the direction of this Court.

II

It was incumbent upon the Court of Appeals for the Eighth Circuit to apply the rules laid down in *United Mine Workers of America* v. *Gibbs* (*supra*), upon remand of this cause and consider and apply § 6 of the Norris-La Guardia Act, 29 U.S.C. 106.

In the case at hand, special proof requirements, as a matter of law, were imposed upon plaintiff-respondent by the provisions of § 6 of the Norris-La Guardia Act which states:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The court, by its decision in the *Gibbs* case, has placed a heavier burden of proof upon a plaintiff in this type of case (*Lewis* v. *Pennington,* 257 F. Supp. 815 at p. 829).

There can be no question that the burden established by § 6 was not met by the plaintiff at the trial. In charging the jury the court stated (T 1167):

> "I instruct you that the defendant labor union was bound by the acts of its agents."

Which statement is clearly at odds with § 6 of Norris-La Guardia, and (T 1166) on burden of proof charged:

> "The burden of proof is upon the plaintiff in this action to establish his case by a fair preponderance of the evidence."

Whereas, this Court has stated in *Gibbs* (p. 735) that "special proof requirements" are imposed by § 6, and

further stated that in enacting this legislation "Congress meant at least to signify a meaning like that commonly accorded such similar phrases as clear, unequivocal and convincing proof."

The Court of Appeals for the Eighth Circuit has refused to consider these errors upon the grounds that issues not raised in the Trial Court or upon appeal cannot be considered.

Petitioner submits that this holding of the Court of Appeals in error and certiorari may now be granted pursuant to Rule 19 of the Rules of the Supreme Court of the United States, which provides in part as follows:

Rule 19(1)(b)

"Rule 19. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

(b) Where a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

In addition, the question of the consideration of pertinent matter and statutes by an Appellate Court has been well considered in 5 *Corpus Juris Secundum* Section 1239 pp. 73 and 74, wherein, the following is stated:

"d. Evidence and Instructions

Errors as to the evidence or instructions are generally not within exceptions dispensing with the ne-

cessity of an assignment of error as to plain or fundamental errors apparent of record.

Exceptions as to plain or fundamental errors apparent on the face of the record are usually held not to apply to errors as to the admission or exclusion of evidence, or its sufficiency, or as to the giving of, or failure to give, instructions.

Nevertheless, a few cases hold that plain or fundamental error, reviewable without an assignment, may consist in the admission of evidence which is clearly erroneous, or clearly in disregard of a recognized public policy or a positive statutory provision, or in the exclusion of evidence the truth and materiality of which are admitted in appellee's brief. Also, fundamental error has sometimes been held to exist because of failure of the trial court properly to instruct the jury, or erroneous instruction to them in a vital matter, or because of an affirmative misdirection of the jury as to the law of the case on the undisputed facts, when a peremptory instruction for one of the parties should have been given, the submission of the case to the jury on an issue not raised by the pleadings, or the giving of an instruction authorizing a finding for plaintiff on an issue not made by the pleadings.

Where plaintiff, having the burden to make out a case, fails to do so, an assignment of error is not necessary."

The record here clearly indicates disregard of a positive statutory provision, failure to properly instruct the jury and, in fact, erroneous instruction and the failure of the plaintiff to make out a case.

III

The Trial Court held as matter of law that the dispute between the parties was a labor dispute, 29 U.S.C.A. § 152(9). The objective of the strike was to exert direct economic pressure on respondent, the primary employer, in support of lawful demands that he comply with the terms of his collective bargaining agreement with the union, hence it was a lawful strike and not a tortious interference with respondent's contract with the Fair.

In the second count of his second cause of action, respondent alleged that petitioner had tortiously interfered with his contracts with seventeen Fair Boards. The Trial Court granted judgment for petitioner N.O.V.

The Trial Court ruled that although lawful picketing inherently interferes with contracts, it is an activity protected by labor statute and, therefore, cannot be the basis for a claim of tortious interference with contract and hence, there can be no fact question as to justification.

In order for the state remedy to be invoked, however, violence must be an element of the strike and the Court of Appeals for the Eighth Circuit was erroneous in its finding of "substantial evidence" of threats of physical harm by Meyers against non-union performers which carried the union's activities "well beyond peaceful primary picketing."

An examination of the record fails to disclose any violence at all and isolated instances of Meyers allegedly attempting to persuade non-union performers not to perform for Smith. Most certainly, there is no "substantial evidence" of conduct "well beyond peaceful primary picketing."

The testimony of Frank H. Duncan, Executive Secretary of the Fair, a witness called by respondent who was bound by his testimony, is most enlightening and clarifying

of the situation with respect to the non-violent nature of the picketing (T 544-545).

> "Q. Mr. Duncan, you had a chance to observe the picket line at the fair, did you not? A. Yes, sir.
>
> Q. And you said you were out there practically all the time from the time it started until it was concluded? You spent a lot of time— A. Yes, sir. I am the Executive Secretary. I practically live there.
>
> Q. Your job is overseeing the entire fair operation, is that it? A. That is correct.
>
> Q. The picketing that you observed was peaceful, wasn't it? A. Basically, yes, except for one small incident.
>
> Q. What was that? A. One of the pickets got in the way of somebody coming from the ticket booth towards the grandstand and didn't want to budge, and it was a farmer boy, so he budged.
>
> Q. He knocked him over, is that it? A. Well, he stumbled, he said, and fell.
>
> Q. I see. A. (Continuing) But other than that, and a few little cat calls, it was peaceful.
>
> Q. There wasn't any violence at all? A. No, sir."

Thus, we see that the pickets were orderly, non-violent and limited to the area where the circus was to be conducted. The Court of Appeals cannot disregard this evidence and find contrary thereto. Its conclusion is contrary to the rulings of this Court in:

> *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton*, 377 U.S. 252, 84 Sup. Ct. 1253;
>
> *United Steelworkers of America* v. *N.L.R.B.*, 376 U.S. 492, 84 Sup. Ct. 899;
>
> *Local 761, International of E. R. & M. Workers* v. *N.L.R.B.*, 366 U.S. 667, 81 Sup. Ct. 1285;
>
> *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 71 Sup. Ct. 961.

The Court of Appeals for the Eighth Circuit erred in reversing the judgment N.O.V. for petitioner on the claim of unlawful interference with contract.

IV

The Trial Court correctly held as a matter of law that the picketing was lawful primary picketing and, therefore, not a violation of 29 U.S.C.A. § 158(b)(4)(ii).

> "The legislative history of § 158(b)(4) frequently referred to as the 'secondary boycott section,' makes it compellingly clear that the evil sought to be eliminated by this legislation was not lawful primary activity, but those union activities which embroil some neutral employer in a labor dispute not of his own making, thus penalizing on unoffending employer to his damage."
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> *Local 978, United Bro. of Carpenters & Joiners* v. *Markwell*, 305 F. 2d 38 (8th Circuit, 1962).

Certainly there was no showing here that the unoffending employer, the Fair Board, was damaged or penalized as a result of any act of petitioner, and its Secretary, Mr. Duncan, admitted the picketing was peaceful, and there was no violence at all.

Nor is there any showing that respondent suffered any loss or damage as a result of any of AGVA's conduct, lawful or otherwise. The proof is exactly to the contrary. The Fair Board refused to cancel respondent's contract at the request of the petitioner. Nor were the non-union performers deterred by the alleged threats.

There was no proof of unlawful conduct of petitioner causing the other sixteen Fair Boards to cancel respondent's contract.

In the *United Steelworkers* case (*supra*), this Court said at 376 U.S. 492, 499, 501, that the distinction between primary and secondary picketing rests upon the type of work being done by the picketed secondary employees. The record is barren of any proof that the picketing inter-

fered with any employees of the Fair Board in the performance of any of their duties.

It is clear from the undisputed facts that the picketing in this case was designed and intended to exert lawful economic pressure on respondent, the primary employer, in the only available fashion, in order to compel him to comply with the terms of his collective bargaining agreement with the union.

The record is barren of any showing that the picketing was intended to or did in fact interfere in any way in the normal business intercourse between the Fair Board and respondent.

There is no evidence to support the Court of Appeals finding that the picketing interfered with the July 26th and 27th grandstand shows and the grandstand concessions. The pickets' banners referred only to respondent's circus. No attempt was made to dissuade customers from patronizing the shows in progress on the 26th or 27th, or the concessions.

In the light of the rulings of this Court in the cases cited under Point III of this brief, the Trial Court properly ruled as a matter of law that this was a labor dispute in which the picketing was directed against the primary employer in an effort to exert lawful economic pressure on him to compel him to comply with his collective bargaining agreement with the union, hence was not in violation of 29 U.S.C.A. § 158(b)(4)(ii).

Conclusion

The picketing conducted was primary and lawful and as a result, both of respondent's causes of action must fall as a matter of law since there would be neither a violation of U.S.C.A. 158(b)(4)(ii) nor a tortious interference with a contractual relationship. In addition, since

the picketing was non-violent, the state remedy for tortious interference is barred under the holding in *Gibbs* and *San Diego Building Trades Council* (*supra*) and the respondent having failed to meet the special proof requirements of § 6 of the Norris-La Guardia Act the judgment N.O.V. of the District Court should be reinstated.

The petition should be granted and the writ issued.

Respectfully submitted,

ALBERT F. KIMBALL,
Counsel for Petitioner.

IRWIN SCHERAGO,
of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

WILLIAM SMITH, doing business as Smith Entertainment Agency and as Smith & Dale Circus, Plaintiff, vs. AMERICAN GUILD OF VARIETY ARTISTS, Defendant.	ORDER No. 4-62-Civ. 365

CONRAD J. CARR and JEROME G. RAIDT, Attorneys for Plaintiff.

LEO DORFMAN and DORFMAN, RUDQUIST, JONES & RAMSTEAD, Attorneys for Defendant.

Defendant has moved for judgment notwithstanding the verdict or in the alternative for a new trial.

The Court has considered the briefs and arguments of counsel.

On all the files and proceedings herein,

IT IS ORDERED:

1. That the motion for judgment notwithstanding the verdict is granted.
2. That the alternative or conditional motion for a new trial is denied.

July 23, 1964.

/s/ EARL R. LARSON
United States District Judge

Memorandum attached.

Appendix A

MEMORANDUM

This case arises out of certain events which transpired in Minneapolis and at Faribault, Minnesota, during the period between July 20 and July 28, 1962. These events in turn are understandable only with reference to certain happenings in Minneapolis and Canada during the spring of 1962.

Beginning in 1956 the plaintiff produced circuses or grandstand shows for fairs and various kinds of celebrations. In the spring of 1962 plaintiff set out for Canada with a group of acts to fulfill contracts he had there and in Alaska. Things did not go well in Canada and plaintiff eventually left the acts and returned to Minneapolis. Plaintiff, as a "producer," was a party to a collective bargaining agreement (The National Code of Fair Practices) with the defendant American Guild of Variety Artists (hereinafter referred to as A.G.V.A.). There was much controvery as to what occurred on the Canadian tour and who was at fault for the troubles the tour experienced, but it was undisputed that plaintiff breached his agreement with defendant before and during the tour.

Under the contract plaintiff was obligated to deposit and maintain cash security to cover compensation, transportation and welfare fund contributions for the performers (paragraph 7). The plaintiff did not post the security prior to leaving on the tour as he was supposed to do, nor did he make the deposit while he was in Canada, though the defendant requested him to do so. The deposit amount which was discussed between the defendant's representative and plaintiff was $5,000, which figure was established because this was approximately the amount of the first week's salaries for the tour. Plaintiff had about $2,100 in cash when he left for the Canadian tour. Plaintiff was obligated to pay the performers their salaries at the end of each week (paragraphs 22 and 31). He failed to do this,

and when he left the tour in Canada he owed the performers between $15,000 and $20,000 in back wages. Under the agreement plaintiff was to make payments to the A.G.V.A. Welfare Trust Fund (paragraph 28) and Supplemental Welfare Fund (paragraph 29). He did not meet these obligations.

The plaintiff had seventeen contracts with County Fair Boards in Minnesota, Iowa, Wisconsin and Michigan to produce circuses during the summer of 1962. The first of these contracts was Faribault, Minnesota, for July 28 and 29. Toward the end of June plaintiff conferred with Herbert Meyers, defendant's local representative. Meyers told plaintiff that he could not commence his seventeen fair tour unless he made arrangements to pay the back salaries owed the performers from the Canadian tour. Plaintiff did not do this and was placed on the A.G.V.A. "unfair list." The seventeen fairs which had contracted with the plaintiff were notified of this by telegram.

With the approach of the Faribault performance, Meyers began negotiations with the Rice County Agricultural Society (hereinafter referred to as the Fair Board), the governing body of the Faribault fair, in an effort to persuade the Board to break its contract with the plaintiff, since plaintiff would be picketed at the fair and would have difficulty putting on a show.* The efforts of Meyers to persuade the Board to break its contract with plaintiff were unsuccessful and defendant began to picket. The picket line was established at the grandstand on the fair grounds, the legends on the placards carried by the pickets

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* There was much conflict in the testimony as to the manner in which Meyers conducted these negotiations. His personality was at the opposite pole to those represented on the Fair Board. He apparently showed neither tact nor wisdom; however, it would be unrealistic to exact these negotiations to be carried out according to the rules of etiquette.

stating that plaintiff was unfair to the defendant. Union members would not cross the picket lines, and plaintiff was unable to fulfill his contract with the Rice County Fair Board to put on a twenty act circus. The contract was then cancelled by the Fair Board and plaintiff did not perform at any of the other sixteen fairs.

Plaintiff commenced an action against defendant based on three claims:

First cause of action—

1. Defendant failed to arbitrate the dispute over back wages and welfare fund payments as required by paragraph 10 of the Collective Bargaining Agreement.

Second cause of action—two counts.

1. The picketing at Faribault was a secondary boycott, proscribed by 29 U.S.C.A. § 158(b)(4) (1963 Supp.), for which defendant is liable in money damages under 29 U.S.C.A. § 187(b).

2. Defendant, through Herbert Meyers' negotiations with the Fair Board and the picketing, tortiously interfered with plaintiff's contractual relations with the Rice County Fair Board and with the sixteen other fair boards with whom plaintiff had agreements.

The case came on for trial before the Honorable Edward J. Devitt on October 15, 1963. A jury verdict for $15,000 was returned against defendant, and Judge Devitt granted defendant's motion for a new trial holding that the evidence was insufficient to sustain a verdict for over $3,000 (representing the loss caused by the Faribault cancellation). During the trial Judge Devitt dismissed plaintiff's first cause of action as to failure to arbitrate.

At the second trial this Court also dismissed the first cause of action; since there was no dispute as to plaintiff's liability, there was no arbitrable issue. In addition,

defendant's motion to dismiss the first count of the second cause of action pertaining to the alleged secondary boycott was granted.* Jurisdiction over the common law ground was retained under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933). The case was submitted to the jury on the common law question alone, and a verdict for $21,000 was returned against defendant. Defendant had moved for a directed verdict and timely moved for a judgment N.O.V. Its motion is based on four grounds:

1. Plaintiff did not prove he was injured by defendant's unlawful interference with his contract with the Rice County Fair Board or with his contracts with any of the other sixteen County fair boards;

2. There was no competent evidence from which the jury could find that the plaintiff sustained damages;

3. The Court, having dismissed the secondary boycott count of the plaintiff's second cause of action, lacked jurisdiction over the common law count;

4. The Court's interrogation of certain witnesses was prejudicial error.

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* To summarize the basis for this decision: The dispute between plaintiff and defendant was a labor dispute within the meaning of 29 U.S.C.A. § 152(9); the strike had the objective of placing direct economic pressure on the primary employer, Smith, in order to resolve the dispute arising from his breach of the collective bargaining agreement. Such a strike in support of lawful demands is permissible.

The Common situs situations present the most difficult problems of distinguishing between primary and secondary activity. The instant activity was not directed at the Fair Board but at the primary employer. The manner of picketing met the standards for lawful primary activity set out in *Matter of Sailors' Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547, given the rather unusual business involved in the instant case.

Plaintiff argued that defendant "threatened, coerced or restrained" certain persons. The picketing was primary and did not become illegal secondary activity even if threats were involved. *United Steelworkers of America* v. *N.L.R.B.*, 376 U. S. 492 (1964).

Appendix A

1. Defendant argues as to the third ground of its motion that where a secondary boycott count is joined with a common law count and the Court dismisses the secondary boycott count on the merits, it lacks jurisdiction over the common law count. Frankly conceding that there is no authority supporting its position other than the recent Supreme Court decision in *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton,* 84 S. Ct. 1253 (1964), the defendant takes the position that the *Local 20* case compels this Court to grant its motion.

The holding of that case does not support defendant's argument. In the *Local 20* case a secondary boycott count was joined with a common law damage count. The District Court awarded damages for the secondary boycott and also awarded damages for a violation of Ohio law which did not fall within the secondary boycott provisions of the Federal labor law. It was the latter award which was the subject of the Supreme Court's discussion, and the Court pointed out that the type of activity proscribed by Ohio was permitted by Federal law as part of the balance struck by Congress when it legislated in the secondary boycott area. The State law thus frustrated the Congressional policy, and a damage award under it could not be sustained in view of the Federal occupation of the field. The Court said that the doctrine of pendent jurisdiction was "of no service" in the case because a State court would also be without authority to award damages in a *Local 20* situation.

In the instant case it was determined after plaintiff had presented his evidence that there was no secondary boycott, hence there is no issue of Federal pre-emption and the *Local 20* case is inapplicable. The important legal question in this case concerns the relationship between primary picketing, proper under Federal law, and the common law tort of interference with contractual relations.

Appendix A

The jurisdictional issue is solely one of pendent judisdiction (the issue which was *not* in *Local 20*).

2. It is plaintiff's theory that defendant, through Herbert Meyers' approaches to the Fair Board and through the picketing, unlawfully interfered with plaintiff's contractual relations with the Fair Board. Furthermore, because of the incidents at Faribault and the telegrams defendant sent out to the various fair boards stating that plaintiff was on the A.G.V.A. unfair list, plaintiff claims that defendant interfered with plaintiff's contractual relations with each of the sixteen other fair boards.

The case thus makes it necessary to explore the uncertain area where a union's right to picket becomes the actionable tort of unjustified interference with contract. Commercial torts are becoming an increasingly important area in the law, see Note, 77 Harv. L. Rev. 890 (1964), and this Court has recently explored at length the Minnesota law on interference with contract and inducement of breach of contract. See *Continental Research, Inc.* v. *Cruttenden,* 222 F. Supp. 190 (1963). The motive of the defendant stands out as the major liability producing factor, and the instructions in the instant case focused on this factor. Yet the law of interference with contract which has developed in the various commercial contexts cannot be appropriately applied directly to the picketing situation since the actionable element in most cases—the defendant's intention to harm the plaintiff—is always present in a strike. The very purpose of a strike or picketing is to weaken the economic position of the employer.

> "The principal weapons which the unions have developed are the strike, the boycott and the practice of picketing. These devices are used to force the employer to shut down his plant or business either by depriving him of labor or of customers until compliance with the demands of the union is made. Con-

> tractual relations are, of course, interfered with, deliberately and intentionally by the defendant unions. *A prima facie tort is thus made out, that is, the union or its members are liable in damages . . . unless a legal privilege affords them immunity.*
>
> "The legal issue in labor disputes thus usually turns on the question of justification or privilege." Harper and James, *The Law of Torts* § 6.13, pp. 523-24 (1958). (emphasis added)

The existence of a prima facie tort provided early courts with a convenient means to strike down unions. See Note, 46 Mich. L. Rev. 389 (1948). The reasoning which altered this situation has been well summarized by Justice Traynor:

> The interests of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. *Imperial Ice Co.* v. *Rossier,* 18 Cal. 2d 33, 112 P. 2d 631, 632 (1941).

The crux of the instant case is to what extent the actions of the defendant have exceeded its privilege, and it is on this point that plaintiff has failed to establish a case. As indicated above, the picketing was for lawful objectives, and it was carried on in a lawful manner.* The test of

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* There was no violence or other independently tortious conduct connected with the instant picketing. If this had been the case a different result might have to be reached here. See, *e.g., Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton,* 84 S. Ct. 1253 (1964); 1 Harper and James, *supra,* at 524: "[T]respass, assault and battery and wilful destruction of property are wrongful and not less so because done in connection with a strike or a picket line." Of course the instant case is differentiated from such situations because the tort complained of is an integral part of the lawful conduct rather than independent of it.

economic strength contemplated by our industrial relations system as a means of resolving conflicts between employers and unions may well result in one of the parties being brought to his knees although mutual self-interest and relative strength militates against such a result in the vast majority of cases. Yet this was the result in the instant case. The defendant's picketing resulted in plaintiff's inability to perform his contract. In furthering its own interests defendant harmed the plaintiff, but its conduct was privileged because carried out within the context of a legitimate labor dispute. 4 Restatement, *Torts* § 775:

> Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.

If the common law provided a remedy for the loser of such a dispute, then it would frustrate the labor policy. This it cannot do.

Plaintiff has largely based his case on what he deems to be the wrongful motives prompting Herbert Meyers, the defendant's branch manager. The evidence for such an argument was Meyers' conversations with the Fair Board. The verdicts in the two trials of this action demonstrate the danger of allowing a jury to speculate as to motivation in a situation where the labor dispute is legitimate. Holding the union liable for a common law tort which is a part of one of the collective bargaining weapons possessed by the union under the statute adds an element to the process which is bound to throw it out of balance. The *Local 20* case cautions against such a result; moreover, liability for peaceful picketing may well raise constitutional issues. Common law remedies have a function with reference to independently tortious acts or crimes, because of the im-

portance of the State interests involved. But, as pointed out above, the interference is assumed in picketing, the question is one of privilege.* Plaintiff might argue that the privilege is exceeded if the motivation is wrongful, and wrongful motivation is that which is aimed at harming the employer—at, for example, putting him out of business. Yet that is an objective clearly contemplated as legitimate by the labor statute. To allow the jury to decide a case such as the instant one is to ask them to make a distinction not recognized by the law. The result would be an exercise of whim unrestrained by instruction. Where the action causing the contract interference (in the instant case the lawful picketing) is protected by the labor statute, there can be no fact question as to justification.

Moreover, whatever Myers' motives were, they were largely irrelevant. If the objective of Meyers' conversations with the Fair Board was to persuade it to cancel its contract with plaintiff, he was unsuccessful. The Board refused to cancel its contract with plaintiff after meeting with Meyers. The interference with the contract was a result of plaintiff's being placed on the unfair list. The defendant had a right to do this. Plaintiff could not fulfill his contract because he required union performers for

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* The discussion here has been in terms of privilege. Other phrasing could be used. In a suit against a musicians union by a booking agent claiming the union had notified its members not to accept or negotiate contracts with him, the court pointed out that there is a right of freedom from interference with contract but said: "It is not necessary to discuss the general aspects of this right . . . since the authorities generally recognize the equal if *not* superior right of union organizations in the interest of its membership to take steps appropriate and lawful to accomplish its purpose. *Some authorities consider the right of the union 'privileged' and others consider it an equal or superior right justifying acts not in themselves unlawful. Pelty* v. *Dayton Musicians Assoc.*, 153 N. E. 2d 218 (Ct. of Common Pleas—Mont. Co., Ohio 1958), aff'd 158 N. E. 2d 223 (Ct. of App. Ohio 1958). (Emphasis added.)

the kind of show he had promised to put on. These performers were not available to an 'unfair'' producer, and so the Faribault contract collapsed. But it is undisputed that Meyers' activities with the Fair Board had no effect.* The contract was cancelled because plaintiff could not perform.

Defendant's motion for judgment N.O.V. must be granted. As a mater of law, defendant's activities were justifiable interferences with plaintiff's contractual relations.

CONDITIONAL RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant has moved in the alternative for a new trial. Defendant argues that the evidence as to plaintiff's loss of profits from the seventeen contracts was speculative and conjectural, particularly since plaintiff's business was newly established, and that its motion for a new trial should, therefore, be granted.

At the outset it should be pointed out that defendant's characterization of plaintiff's business as "newly established" is inaccurate. While plaintiff had never produced a twenty act circus before, he had been profitably producing shows at fairs and other occasions since 1957, and it was thus reasonable to anticipate that he would realize some profits from the seventeen county fair contracts he had.

A great deal more evidence was presented at the second trial than at the first trial on the lost profits issue. At the first trial only one witness in addition to the plaintiff

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* Plaintiff has more or less assumed that there was something wrong with Meyers' meeting with the Fair Board. Meyers was entitled to notify the Fair Board (and the sixteen other Fair Boards) that the plaintiff was, on the unfair list. He was also entitled to negotiate with the Fair Board with reference to the show going on without Smith, because such a resolution of the dispute was a means of furthering the best interests of the union members.

appeared, and he estimated plaintiff's net profit from the seventeen contracts. In granting a new trial Judge Devitt stated that while a verdict for up to $3,000 for the loss of the Faribault contract might have been sustained, "the estimates of loss made by the plaintiff Smith and the witness Smith were not, without more, sufficient to afford the reasonable certainty required by the law. . . ." Apparently in an effort to meet this deficiency at the second trial plaintiff called the representatives of several of the fair boards with whom plaintiff had contracts. These witnesses testified as to the financial arrangements (generally minimum guarantees and a division of the income over the minimum), previous experience at their fairs and, sometimes, with plaintiff, grandstand seating capacity and, in some cases, the weather. The witnesses were experienced as to their fairs and their testimony was competent, and provided adequate evidence, along with the other testimony, from which the jury could find with reasonable certainty the amount of profits the plaintiff would have made on the seventeen contracts. In its instructions the Court pointed out that damages should not be awarded if they were uncertain, contingent or speculative. It is interesting to note that with the additional evidence the jury in the second trial returned a verdict $6,500 larger than in the first trial.

If the various witnesses of plaintiff had not been allowed to testify, plaintiff would have been barred from proving damages. Yet, if the Court is wrong in its view as to the non-existence of legal liability on the part of the instant defendant, the defendant wrongfully caused the plaintiff's loss, and it is not in a strong position to complain of the uncertainty of the damages. See *Willmar Gas Co.* v. *Duipinch,* 239 Minn. 173, 53 N. W. 2d 225, 229 (1952).

The Minnesota Supreme Court has said that "the only objection to loss of profits as a measure of damages is the

possibility that such a measure might be too uncertain of proof." *Poppen* v. *Wadleigh,* 235 Minn. 400, 51 N. W. 2d 75, 78 (1952). As indicated above, the evidence of loss of profits was sufficiently certain so that the jury could reasonably make the finding it did. See 4 Restatement, *Torts* § 912 comment (d). Lost profit cases are never easy of resolution but "the tendency of the [Minnesota] court has been to ascertain damages, when an actual wrong has been done, though doing so involves labor, rather than to deny relief with the easy statement that the damages sought are too speculative and conjectural or too remote to permit a recovery." *Ellis* v. *Lindmark,* 177 Minn. 390, 225 N. W. 395, 397 (1929). See *Hendrickson* v. *Grengs,* 237 Minn. 196, 54 N. W. 2d 105, 109 (1952).

The Court would be less than frank if it did not admit to being troubled by the evidence of lost profits. However, two juries have considered the evidence and it is likely that a third would reach a similar result unless all testimony as to lost profits was ruled out, a step which would not be proper. As Julge Holtzoff has said:

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances,

> *a fortiori* a second verdict reaching substantially the same result on practically the same evidence should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. *Frank* v. *Atlantic Greyhound Corp.*, 177 F. Supp. 922, 923 (D. C. 1959), *aff'd* 280 F. 2d 628 (D. C. Cir. 1960).

A discussion of causation by this Court after strongly indicating its views as to the absence of legal liability in the case in granting a judgment N.O.V. emphasizes the unreality involved in a conditional ruling on the alternative motion. See *Momand* v. *Universal Film Exchange, Inc.*, 72 F. Supp. 469, 483 (D. Mass. 1947) (Wyzanski, J.) As at several other points, plaintiff's legal theory as to how Faribault related to the other sixteen contracts was somewhat unclear. However, if there was liability for defendant's actions in Faribault, we fail to see how the liability could end there. Several contracts were cancelled at Faribault by other fair boards because of what occurred there; moreover, plaintiff could reasonably expect that had he attempted to perform at other fairs similar things would have happened since he would remain on the "unfair list."

Defendant's alternative motion for a new trial is denied.

July 23, 1964.

EARL R. LARSON

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,856

William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus,

Appellant,

v.

American Guild of Variety Artists,

Appellee.

No. 17,857

American Guild of Variety Artists,

Appellant,

v.

William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus,

Appellee.

Appeals from the United States District Court for the District of Minnesota.

[AUGUST 9, 1965.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

Appendix B

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by plaintiff William Smith from an order of Judge Larson sustaining the motion of defendant American Guild of Variety Artists (AGVA) for judgment n.o.v. setting aside a jury verdict for the plaintiff and from final judgment dismissing plaintiff's complaint. Plaintiff is also appealing from the trial court's refusal to submit to the jury for consideration an action based upon secondary boycott and from the refusal of the trial court to submit to the jury his claim for punitive damages.

AGVA by cross-appeal raises the issue that the trial court erred in conditionally denying defendant's alternate motion for a new trial based upon the ground that there is no substantial evidence to support the fact of damage or the amount thereof and upon the additional ground that the court's interrogation of certain witnesses was improper and prejudicial.

This case had been previously tried to a jury with Judge Devitt presiding. The jury returned a verdict for the plaintiff for $15,000. Judge Devitt granted defendant's motion for a new trial upon the ground the verdict was excessive, stating that in his view the evidence would not support a verdict for more than $3,000. This case was again tried to a jury before Judge Larson. The jury returned a verdict of $21,500.

Plaintiff's complaint sets out two causes of action. The first cause of action is based upon failure to arbitrate. Both Judge Devitt and Judge Larson dismissed this cause of action. No appeal is taken on the failure to arbitrate issue and hence no consideration thereof is required.

In the second cause, plaintiff seeks damages based upon (1) violations of 29 U.S.C.A. § 158(b)(4)(ii) by secondary boycott; (2) wrongful interference with contractual relations.

Appendix B

A summary of some of the background facts appears desirable. William Smith had produced grandstand shows and circuses for fairs and celebrations since 1956. He had contracts with numerous union performers and had executed contracts with seventeen fairs for the presentation of a grandstand show or circus during the 1962 season.

Smith had obtained contracts for a number of performances in Canada and Alaska for the spring of 1962. Under his contract with AGVA he agreed to hire only union acts and to cover wages and transportation with security posted with the defendant and to make certain welfare contributions to defendant for the performers. He failed to comply with the security and welfare provisions with respect to the Canadian trip and he also failed to fulfill his obligation to pay the performers the full salaries due them. There is much controversy in the record as to what occurred in Canada. Smith contends that some of the performers attempted to take the show away from him. Plaintiff did leave the performers in Canada in the middle of the tour. The show continued its tour under the management of some of the employees.

Plaintiff had contracts to produce a show advertised as a twenty-act circus at seventeen fairs in the midwest during the summer of 1962. Many of the performers on the Canadian tour were under contract to plaintiff to play at such fairs. The fair run was to commence at the fair at Faribault, Minnesota, on July 28, 1962, with an afternoon and evening show on that date and an evening show the following day. On July 17, prior to the first performance at Faribault, a meeting of the defendant organization was held at Minneapolis to consider complaints made by plaintiff's performers arising out of the Canadian tour. As a result thereof, plaintiff was put on the unfair list for nonpayment of salaries due and was notified of such

action by telegram, and notice thereof was also given to the seventeen fairs with whom plaintiff held contracts.

Herbert Meyers, AGVA manager of defendant's Minneapolis branch, contacted the Faribault Fair Board by telephone and later had a personal meeting with the Board. Board members testified that Meyers told them that even if plaintiff wanted to produce a non-union show, he could not do so because the defendant would not permit it and they also said that the AGVA was going to take over the contract. The Fair Board was advised that plaintiff would not be permitted to put on the show and that the fair would be picketed. The Board was also urged to cancel plaintiff's contract and to enter into a contract for the shows with the defendant. The Board refused to cancel the contract.

AGVA put up a picket line at the grandstand on the afternoon of July 26. The pickets were placed so that customers wishing to purchase grandstand tickets had to cross the picket line. Plaintiff's circus was not scheduled to, and in fact did not, perform until Saturday afternoon, July 28. The picketing continued on Thursday and on all day Friday and Saturday, and on part of Sunday. An automobile thrill show on Thursday night and a wrestling show on Friday night, with which plaintiff had no connection, were picketed.

Plaintiff assembled non-union acts for the Faribault engagement. After the Saturday afternoon performance, the Fair Board canceled plaintiff's contract for the remaining shows on the stated ground that the number and quality of the acts did not conform to the contract. Within a short time thereafter, plaintiff's sixteen other fair contracts were canceled. Additional facts will be set out in the course of the opinion.

Appendix B

THE SECONDARY BOYCOTT ISSUE

Judge Larson, upon defendant's motion made at the close of all of the evidence, dismissed plaintiff's cause of action based on secondary boycott. In explanation of such action, the court states:

> "To summarize the basis for this decision. The dispute between plaintiff and defendant was a labor dispute within the meaning of 29 U.S.C.A. § 152(9); the strike had the objective of placing direct economic pressure on the primary employer, Smith, in order to resolve the dispute arising from his breach of the collective bargaining agreement. Such a strike in support of lawful demands is permissible.
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> "The common situs situations present the most difficult problems of distinguishing between primary and secondary activity. The instant activity was not directed at the Fair Board but at the primary employer. The manner of picketing met the standards for lawful primary activity set out in *Matter of Sailors' Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547, given the rather unusual business involved in the instant case.
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> "Plaintiff argued that defendant 'threatened, coerced or restrained' certain persons. The picketing was primary and did not become illegal secondary activity even if threats were involved. *United Steelworkers of American* v. *N.L.R.B.*, 376 U.S. 492 (1964)."

We agree with Judge Larson's view that Smith's failure to comply with his contract with AGVA with respect to paying wages due employees, welfare payments and the posting of security, afforded AGVA a right to place Smith on the unfair list and to strike in support of its lawful demands. However, we do not consider the evidence here to be so great as to warrant a determination by the court

as a matter of law that the strike conducted was a primary strike directed only at the employer Smith. 29 U.S.C.A. § 158(b)(4)(ii) makes it an unfair labor practice for a labor organization or its agents:

> "(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, business with any other person, or forcing or processor, or manufacturer, or to cease doing requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: PROVIDED, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

The statutory proviso clearly protects primary picketing. The problem presented is whether the court was justified in determining as a matter of law that the strike was a primary strike.

The picketing took place on the Fair's premises. We believe this to be a common situs situation where a neutral employer is engaged along with a struck employer in different activities on the same premises. In *NLRB* v. *International Hod Carriers,* 8 Cir., 285 F.2d 397, 400-401, after quoting from *NLRB* v. *Denver Bldg. & Const. Trades Council,* 341 U.S. 675, we stated:

> "To resolve the numerous problems which stem from common situs activities, and in order to protect the

Union's right to carry on its lawful activities against the primary employer, as well as to adequately protect the neutral employers and employees, strangers to the dispute, certain evidentiary standards were evolved for distinguishing between primary and secondary picketing at a common situs. These may be stated as the 'Moore Dry Dock tests,' Sailors' Union of the Pacific, AFL and Moore Dry Dock Company, 92 N.L.R.B. 547. Under the situation presented in that case, the Board ruled that picketing the premises of a secondary employer is primary if it meets the following conditions:

> " 'a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; c) the picketing is limited to places reasonably close to the location of the *situs*; and d) the picketing discloses clearly that the dispute is with the primary employer.' "

The evidence before us does not meet the Moore Dry Dock tests set out in the foregoing quotation, particularly (b) which relates to the primary employer at the time being engaged in his normal business activity at the situs. As heretofore set out, the picketing at the grandstand commenced two days before plaintiff's scheduled performance was given and continued after defendant became aware that plaintiff's contract had been canceled. Such picketing interfered with the Thursday and Friday grandstand shows with which plaintiff had no connection whatsoever and the picketing also interfered with grandstand concessions.

Moreover, prior to the opening of the fair, defendant made repeated demands that plaintiff's contract be canceled and that a show sponsored by defendant be substi-

tuted. When such efforts failed, Meyer stated, "this leaves me no alternative but to picket the fair." The picket signs read, "Do Not Patronize CIRCUS at this FAIR." The words "at this" were much smaller than the other words making the sign appear to read "Do not patronize Circus Fair."

If as we have held the picketing does not fall in the category of lawful primary picketing, a violation of § 158 (4)(B) is established by proof that an objective of the strike is to compel a neutral employer to cease doing business with the struck employer. In considering the "an object test" in *Local 618* v. *NLRB*, 8 Cir., 249 F.2d 332, 334, we said:

> "The 'an object' test, applied here by the Board, is recognized as a proper test in cases where the picketing involved was not lawful primary picketing. *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689, 71 S.Ct. 943, 95 L.Ed. 1284; *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, 700, 71 S.Ct. 954, 95 L.Ed. 1299. The Court holds that it is not necessary to find that the sole object of the strike was that of inducing a neutral employer to cease doing business with another person."

We conclude that there is an evidentiary basis in our present case for a jury finding that a common situs situation is here presented, that the strike is not a lawful primary strike and that an objective of the strike was to compel the Fair Board to cease doing business with the plaintiff. The court erred in directing a verdict on the secondary boycott issue and in failing to submit such issue to the jury. Such error requires a reversal.

Appendix B

UNLAWFUL INTERFERENCE WITH CONTRACTUAL RELATIONS ISSUE

Minnesota courts, as well as courts generally, have long recognized the existence of a common law action based upon tortious interference with contractual relations.

> "The courts hold with substantial unanimity that the wrongful and malicious interference by a stranger with existing contract relations between others, which causes one of the parties to breach the contract, is a tort, and that the injured party may recover damages therefor." *Carnes* v. *St. Paul Union Stockyards Co.*, 205 N.W. 630, 631.

See *American Surety Co.* v. *Schottenbauer*, 8 Cir. 257 F.2d 6; *Continental Research, Inc.* v. *Cruttenden, Podesta & Miller, D.Minn.*, 222 F.Supp. 190; *Wolfson* v. *Northern States Management Co.*, 299 N.W. 676. See generally 86 CJS Torts, § 44; 30 Am. Jur. Interference, §§ 18-32; annot. 26 A.L.R. 2d 1227. But if the interference is justifiable or privileged, there is no liability. See *Royal Realty Co.* v. *Levin*, 244 Minn. 288, 69 N.W. 2d 667; *Sorenson* v. *Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754. The Minnesota court has commented upon justification: " 'To justify an act of interference of this sort it must be founded upon some lawful object.' " *Sorenson* v. *Chevrolet Motor Co.*, supra at 755. The malice required by the Minnesota court has been defined as follows:

> "The term 'malice', as used in the class of cases mentioned, means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right. Whether a wrongdoer's motive in interfering is to benefit himself, or to gratify his spite by working mischief to another, is immaterial; mal-

ice in the sense of ill will or spite not being essential." *Carnes* v. *St. Paul Stockyards Co.*, 205 N.W. 630, 631-32.

"'"Interference with Contract Relations," includes not merely the procurement of a breach of contract, but all invasion of contract relations, so that any act injuring or destroying persons or property which retards, makes more difficult or prevents performance, or makes performance of a contract of less value to the promisee, may fall within its scope, it may be said that the interest in a contract being à property right, a party thereto has a right of action against persons who are by their conduct substantially interfering with the performance thereof.'" *Johnson* v. *Gustafson*, 277 N.W. 252, 254.

The trial court, after it had submitted the contractual interference issue to the jury and a verdict in favor of the plaintiff had been returned, sustained the defendant's motion for judgment n.o.v. The trial court, citing 1 Harper and James, The Law of Torts, § 6.13, recognizes that contractual relations are interefered with deliberately and intentionally in a strike and that a prima facie tort is thus made out. The court bases its decision on the premise that where the action causing the contractual interference is protected by a labor statute, the rights of labor under such statute must be protected and that hence the issue in such type of case is whether the labor statutes afford justification for the action complained of. We agree that a right to strike falling within the protection of national labor statutes would afford a defense of justification or privilege to a contractual interference action. The court states:

"The crux of the instant case is to what extent the actions of the defendant have exceeded its privilege,

> and it is on this point that plaintiff has failed to establish a case. As indicated above, the picketing was for lawful objectives, and it was carried on in a lawful manner. The test of economic strength contemplated by our industrial relations system as a means of resolving conflicts between employers and unions may well result in one of the parties being brought to his knees although mutual self-interest and relative strength militates against such a result in the vast majority of cases. Yet this was the result in the instant case. The defendant's picketing resulted in plaintiff's inability to perform his contract. In furthering its own interests defendant harmed the plaintiff, but its conduct was privileged because carried out within the context of a legitimate labor dispute."

Plaintiff raises the issue that the court erred in placing the burden upon him on the privilege issue. The first sentence of the excerpt just quoted lends support to plaintiff's claim that such burden was placed upon him. In *Royal Realty Co.* v. *Levin, Minn.*, 69 N.W.2d 667, 673, the Minnesota court recognized "that the burden of proving sufficient justification for the interference rests on the defendants." This view is in accord with the general interpretation. See Annot. 26 A.L.R.2d 1227, 1263-64. Thus it appears that the burden of proof on justification is on the defendant. From a reading of the court's opinion as a whole, we doubt whether the court's decision turned upon the burden of proof issue and we would hesitate to reverse on this ground alone.

Plaintiff's basic contention is that the court erred in determining upon the record before us that justification existed as a matter of law for defendant's picketing of the scope here involved. In *American Surety Co.* v. *Schottenbauer*, supra, this court in considering a Minnesota contractual intereference case determined that Minnesota has

adhered to the view that the plea of justification is ordinarily one for the jury.

Congress has by the Taft-Hartley Act granted labor certain rights but it has also defined and proscribed certain unfair labor practices. Union conduct which would constitute an unfair labor practice is not privileged. In the preceding division, we have expressed our view that a fact issue is presented on the secondary boycott issue. A violation of the secondary boycott provision is an unfair labor practice. Judge Devitt, who presided at the first trial submitted the secondary boycott issue to the jury and in overruling a motion for judgment n.o.v. stated:

> "A second ground supporting the motion for judgment n.o.v. is that the plaintiff failed to sustain the burden of proof that he was damaged *by reason* of any unfair labor practice under § 8(b)(4). Section 303(b) specifically requires that the action complained of be the proximate cause of the alleged injury. The evidence on this point was sparse. It is not unlikely that the contract termination was largely the result of plaintiff's inability to perform the contract. But the jury's verdict is entitled to great weight, and the party in whose favor the verdict was returned is entitled to all favorable inferences that can be reasonably drawn from the evidence."

The evidence on such issue was at least as strong at the second trial.

Additionally, we note that § 8(b)(1) of the Taft-Hartley Act, 29 U.S.C.A. § 158(b)(1) provides:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: ... ."

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Section 7 of the Act (29 U.S.C.A. § 157) provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (Emphasis added.)

The effect of Section 8(B)(1) was described by the chief sponsor of the Act, Senator Taft, in this manner:

> " 'The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them [that is, the employees not the public]; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment.' " *Capital Service, Inc.* v. *NLRB*, 9 Cir., 204 F.2d 848, 853.

See *Automobile Workers* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 272. The Supreme Court has

consistently recognized that Section 8(b)(1) was not the exclusive method of controlling threats, coercion and violence against employees by labor unions. See *Automobile Workers* v. *Wisconsin Employment Relations Board, supra; United Workers* v. *Laburnum Contr. Corp.*, 347 U.S. 656.

The evidence here would support a finding that the union's activities went well beyond peaceful primary picketing. There is substantial evidence of threats of physical harm made by Meyers and other pickets to non-union employees and fair officials which placed them in fear for their safety. When Smith's union employees went on strike, he employed non-union actors to put on the show. There is substantial evidence from which the jury could find that the defendant threatened and coerced such non-union actors with the result that some refused to perform and the performance of others was impaired. An inference could be drawn that the substandard performance could be attributed to threats made by the pickets. Moreover, the Secretary of the fair testified that Meyers told him the dog man was pretty mad and that "he would hate to be in my shoes because I might not be living tomorrow."

The Fair Board found it to be necessary to arrange for additional police protection. It is true that the Fair Board in canceling the contract assigned the reason that the performance did not conform to the contract. The threats made could well be found by the jury to be an important factor in the termination of Smith's contract. Picketing beyond lawful primary picketing could also have played a part in inducing the Fair Board to cancel the contract. The jury could have found that AGVA's actions proximately caused plaintiff's damage. It is not necessary that such action be the sole or primary cause of the damage but only that it be a substantial cause. See

Haverhill Gazette Co. v. *Union Leader Corp.*, 1 Cir., 333 F.2d 798, 805-6; *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 9 Cir., 252 F.2d 473, 479; Restatement, Torts § 431.

Plaintiff presented evidence that the inferior performance and difficulty at Faribault caused cancellation of the sixteen favorable contracts he had with other fairs. The damage issue submitted to the jury relates to the profits at Faribault and the sixteen other fairs. Judge Larson in his opinion states:

> "[I]f there was liability for defendant's actions in Faribault, we fail to see how the liability could end there. Several contracts were cancelled at Faribault by other fair boards because of what occurred there; moreover, plaintiff could reasonably expect that had he attempted to perform at other fairs similar things would have happened since he would remain on the 'unfair list.'"

Plaintiff made a prima facie case of contractual interference. We believe the issue of whether defendant's conduct was justified or privileged was one of fact for the jury's determination. The court erred in determining as a matter of law that the defendant's conduct was privileged and in granting judgment n.o.v.

PUNITIVE DAMAGES

Plaintiff urges the court erred in refusing to submit his claim for punitive damages to the jury. The court stated "there is not sufficient evidence as to any claim for punitive damages." Both Judge Devitt and Judge Larson refused to submit the punitive damage issue. *Teamsters Union* v. *Morton*, 377 U.S. 252, 260, holds that damages caused by secondary activities proscribed by § 303 are

limited to actual compensatory damages. There is also an indication that with respect to peaceful secondary activities, federal law has preempted the field and that state law must yield to federal limitations. There is evidence here that the threats and conduct went beyond lawful, peaceful primary picketing. However, the privilege or justification defense appears to turn largely on federal labor law. Plaintiff has pointed out no Minnesota cases holding punitive damages are allowable in actions of this type. We are disposed to accept the considered view of the two experienced Minnesota federal judges who heard this case to the effect that no punitive damages are allowable.

CROSS-APPEAL

Defendant has appealed from the trial court's order conditionally denying its motion for a new trial. Defendant's principal contention is that the evidence is insufficient to establish the fact of damage or the amount thereof. The court in ruling on the motion stated that the defendant was wrong in its contention that plaintiff's business was newly established. The court further observed that plaintiff had been profitably showing at fairs since 1957 and that it was reasonable to anticipate he would realize some profits from the seventeen fair contracts he held. The court also points out that a great deal more evidence was produced on lost profits at the second trial than at the first trial. Judge Devitt determined that the evidence at the first trial would support some damages but granted a new trial on the basis the damages allowed were excessive. The record here supports the court's determination that the evidence was adequate to establish the fact of damages. For a discussion of applicable standards on the damage issue, see *McCleneghan* v. *Union Stock Yards Co.*, 8 Cir., — F.2d

— (July 21, 1965). The court did not abuse its discretion in refusing a new trial.

Excessiveness of verdict is a matter basically for determination by the trial court and this court will interfere only in those rare situations where there is plain injustice or a monstrous or shocking result. *Lowery* v. *Clouse*, 8 Cir., — F.2d — (July 16, 1965); *Solomon Dehydrating Co.* v. *Guyton*, 8 Cir., 294 F.2d 439, 446-48.

We have examined defendant's contention that the trial courts independent interrogation of two witnesses on the question of anticipated profits was erroneous and prejudicial and find it to be without merit.

SUMMARY

On plaintiffs appeal, we hold that the court erred in entering judgment n.o.v. for defendant. The court also erred in withdrawing from the jury plaintiff's cause of action based on secondary boycott.

The case was fairly submitted to the jury by proper instructions on the contractual interference cause of action. Such a cause of action is recognized and enforced under Minnesota law. The instructions adequately advised the jury that the defendant had a right to place plaintiff on the unfair list and to conduct a primary strike. The issue of privilege and justification was fully covered. Two juries have determined that the plaintiff is entitled to recover.

Plaintiff claims the same damages on the secondary boycott and contractual interference causes of action. Plaintiff is entitled to but one recovery for the same wrong. Thus in view of the favorable verdict on the contractual interference cause of action, plaintiff has suffered no prejudice by the court's failure to submit the secondary boycott cause of action.

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Upon plaintiff's appeal, we reverse. We affirm on defendant's cross-appeal. This case is remanded to the trial court with directions to vacate its order of dismissal based on the sustaining of defendant's motion for judgment n.o.v. The trial court is directed to reinstate the verdict and enter judgment accordingly.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

AMERICAN GUILD OF VARIETY ARTISTS

v.

SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 808. Decided April 18, 1966

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is *vacated* and the case is remanded to that Court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, No. 243, October Term, 1965, decided March 28, 1966.

MR. JUSTICE DOUGLAS dissents.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,856

William Smith, Doing Business as Smith Entertainment Agency and as Smith & Dale Circus, Appellant,

v.

American Guild of Variety Artists, Appellee.

No. 17,857

American Guild of Variety Artists, Appellant,

v.

William Smith, Doing Business as Smith Entertaniment Agency and as Smith & Dale Circus, Appellee.

Opinion on Remand by Supreme Court.

[November 18, 1966.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

We filed our opinion in this case, reported at 349 F.2d 975, on August 9, 1965. We held that plaintiff was entitled

to the recovery allowed by the jury verdict against American Guild of Variety Artists (AGVA) upon the cause of action based on wrongful interference with contract rights. Rehearing was denied September 9, 1965. On April 18, 1966, in *American Guild of Variety Artists* v. *Smith*, 384 U.S. 30, the Supreme Court granted certiorari, vacated our decision and remanded in an opinion reading:

> "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715."

It is our understanding, arrived at after careful consideration of the Supreme Court opinions in this case and *Gibbs*, that we are directed to apply the law as stated in *Gibbs* to our present case insofar as common issues are presented.

In *Gibbs*, as here, damages were claimed against a labor union based upon a secondary boycott under § 303 of the Labor Management Relations Act, 29 U.S.C.A. § 187, and upon a state tort action of unlawful interference with contractual relations. The Supreme Court recognized in *Gibbs* that the state contractual interference claim was properly joined under the doctrine of pendent jurisdiction and that state law remedies against violence and threats of violence in labor disputes can be sustained against the challenge of preemption by a federal labor law. Thus *Gibbs* supports our determination in our prior opinion that the court acquired jurisdiction under the pendent jurisdiction doctrine of the state contractual interference claim and that no federal preemption is established by reason of the threats of violence by AGVA.

In *Gibbs*, the reversal of the favorable judgment for the claimant on the contractual interference action ap-

pears to be based primarily upon the Court's determination that the standard of proof for establishing union participation, authorization and ratification of the charged unlawful acts, as prescribed by § 6 of the Norris-LaGuardia Act, had not been met. Section 6 reads:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The *Gibbs'* Court states:

> "Petitioner vigorously contends that § 6 applied to the state claims in this case; that, on this record, it cannot be charged with having participated in or authorized the violence of August 15-16; and that its acts once it learned of the violence fell short of what would be necessary to show either ratification of the violence or any intent to build its picketing campaign upon the fears the violence engendered. We agree.
>
> * * *
>
> Plainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes, whether or not they are associated with claims under § 303 to which the section does not apply." 383 U.S. 715, 735, 737.

The Court determined that the burden of proof imposed by § 6 had not been met and reversed the favorable judgment for the claimant.

Our best judgment is that it is the holding on this issue that brought about the remand of the case now before us.

After remand of the case to us, we invited counsel to brief and orally argue the following points:

(a) Has the § 6, Norris-LaGuardia defense, heretofore been raised either in the trial court or upon appeal?

(b) If such issue has not been raised, can the Court consider it at this time?

(c) If the defense is open for consideration, the views as to the applicability of the defense to the facts of this case should be discussed.

(d) A discussion of the effect of *Gibbs* upon any other aspect of this case.

AGVA has not either in the supplemental brief it has filed nor in oral argument asserted that it raised the § 6 contention in any way in the trial court or upon the appeal leading to our prior opinion. In fact, AGVA has admitted that it has not previously raised such issue. By reply brief, it states:

> "The obvious answer to appellant's contention in his supplemental brief that 29 U.S.C. 106 has not been raised and may not be raised or considered at this time is that the Supreme Court of the United States in its order of reversal and remand in this very case * * * itself, on its own initiative raised the question of the application of that statute. Whatever *United Mine Workers of America* v. *Gibbs* * * * holds, surely the most important issue in that case and the most thoroughly discussed issue which is relevant to the instant case is the application of 29 U.S.C. 106. When the Supreme Court asked this Court to consider this case in light of the *Gibbs* case, it necessarily *held* that 29 U.S.C. 106 can be brought into the case on appeal; the Supreme Court brought the statute in.

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"Apparently the Supreme Court of the United States believes the strong Federal policy behind domestic industrial peace is to overcome any technical rules of procedure and hoary general rules."

It is apparent from the record in this case before the Supreme Court that § 6 had not been considered in our prior opinion. If the failure to consider § 6 was error per se upon the record made whether or not the § 6 issue was properly before the Court, we would assume the Supreme Court would have reversed outright as it did in *Gibbs*.

Section 6 is either a rule of evidence or one changing the substantive law of agency. *United Mine Workers* v. *Gibbs*, supra, p. 736; *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 403.

In *Sisco* v. *McNutt*, 8 Cir., 209 F.2d 550, 553, we squarely held that § 6 did not deprive the district court of jurisdiction to try the action. We are still of the view that § 6 is not a jurisdictional statute.

Here, as in *Sisco*, the § 6 issue was not raised in the trial court. We there held that the § 6 issue, raised for the first time upon appeal, could be given no consideration, stating:

"It is only in exceptional cases that questions of law not presented to or passed upon by the trial court will be reviewed. *Duigman* v. *United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 and cases cited; *Trapp* v. *Metropolitan Life Ins. Co.*, 8 Cir. 70 F.2d 976, 981; *Helvering* v. *Hormel*, 8 Cir., 111 F.2d 1, 5, affirmed 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037. The general and almost invariable rule is that questions not called to the attention of or ruled upon by a trial court will not be reviewed on appeal. *Goldie* v. *Cox*, 8 Cir., 130 F.2d 695, 715; *Zuckerman* v. *McCulley*, 8 Cir., 170 F.2d 1015, 1018; *Hoyt* v. *Clancey*, 8 Cir., 180 F.2d 152, 154; *Barnard* v. *Wabash Railroad*

> *Co.*, 8 Cir., 208 F.2d 489. It is safe to say that this rule should be adhered to except 'where the obvious result would be a plain miscarriage of justice.' *Hormel* v. *Helvering*, 312 U.S. 552, 558, 61 S.Ct. 719, 772, 85 L.Ed. 1037. The application of the rule in this case will not produce a plain miscarriage of justice. A departure from the rule would not be justified. The defendant had his full day in court. Having made no objections to the legal theory upon which the issue of his liability was submitted to the jury, either by asking for instructions or taking exceptions to the instructions given, he is in no position to assert that the District Court committed prejudicial error in not submitting the case upon a different theory." 209 F.2d 550, 553-54.

To like effect, see *Stanley* v. *United States*, 6 Cir., 245 F.2d 427, 435. We believe that the result reached in *Sisco* is sound and conducive to the proper administration of justice.

Moreover, an additional obstacle is here presented. The § 6 issue was not raised or argued in any way upon the appeal resulting in our prior decision. Our Rule 11(b), in common with generally prevailing appellate rules, requires a concise statement of points relied upon for reversal.

Questions not raised, briefed nor argued will ordinarily be given no consideration by an appellate court. *Trialmobile Co.* v. *Whirls*, 331 U.S. 40, 50; *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186; *Fleming* v. *Munsingwear*, 8 Cir. 162 F.2d 125, 127; *Anderson* v. *Federal Cartridge Corp.*, 8 Cir., 156 F.2d 681, 683; *Cohen* v. *United States*, 8 Cir., 142 F.2d 861, 863; 5 Am. Jur. 2d, Appeal and Error § 648. See *United Mine Workers* v. *Gibbs*, supra, n. 29, pp. 737-38; *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445; *United States* v. *Spector*, 343 U.S. 169, 172; *United States* v. *New York Tel. Co.*, 326 U.S. 638, 650-51, n.18.

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In *Gibbs*, considerable emphasis is placed upon the fact that the violence complained of broke out at a time when no representative of the United Mine Workers was present. Gilbert, the field representative for the area, was attending an executive board meeting elsewhere. When he learned of the violence while at such meeting, he immediately returned with directions from his union superiors to establish a limited picket line to prevent further violence. No violence thereafter occurred at the lawfully picketed mine site. As pointed out in the excerpt from the *Gibbs* opinion supra, the union there urged § 6 applied to state claims and that the international union did not authorize or ratify the violence.

In our present case, the issue of lack of participation, authorization or ratification by the defendant union of the activities conducted was not raised by the pleadings, by motion for directed verdict, by request for instructions or exceptions to instructions, by brief or argument before us on the prior appeal, or in any other manner. The activities of which plaintiff complains were directed by Herbert Meyers, branch manager of the defendant at Minneapolis. Meyers conferred with AGVA about putting plaintiff on the unfair list and about preventing him from showing at the fairs. Meyers went to the Faribault Fair Board some days prior to the time plaintiff was scheduled to put on his show at the fair and vigorously pressed the Board to cancel plaintiff's contract and enter into a new contract with him for the fair show. While meeting with the Fair Board, Meyers called AGVA headquarters by telephone and had some one in this office advise the Board that it had a right to break the contract with plaintiff. Meyers testified, "The national office told me that under no circumstances would they allow this fair to go on under Smith's jurisdiction." Stebbing, a union picket, said "Anything serious, we always telephoned the New York office."

Thus, it is not surprising that the Union as a matter of trial strategy did not elect to raise the issue of lack of union participation, authorization and ratification of the activities here involved. A reading of the pleadings and the briefs reflects that AGVA chose to accept responsibility for what was done and to defend upon the basis that its activities did not go beyond justifiable and excusable primary activity. For example, under a brief heading "Picketing by AGVA and its contact with the Fair Board was not tortious", states, "Were the actions of AGVA justified? Did it have a legitimate interest to protect? They were. It did. The record speaks clearly to the point."

We believe that this case falls within the general rule to the effect that issues not raised in the trial court or upon appeal cannot be considered. No miscarriage of justice has been shown. On the other hand, we believe that if the injection of the § 6 issue were permitted, at this late date, plaintiff who had no occasion to meet such issue by evidence or otherwise would be unfairly prejudiced.

This case has been tried twice. Two separate juries have found against AGVA on the contract interference claim. No request for an instruction based on § 6 was made at either trial nor was any objection made to the instructions there for failure to cover § 6. The motion for a directed verdict fell far short of fairly calling the § 6 burden of proof issue to the attention of the court. Even if such issue had been raised on motion for a directed verdict, our examination of the record satisfies us a fact issue was made out on union participation, authorization and ratification under § 6 standards.

In our view, other issues presented and determined in our opinion upon the prior appeal are not within the scope of the *Gibbs* opinion and the remand based thereon. A re-examination of such issues is not required. We adopt and re-affirm our prior opinion, as amended by what we have heretofore said, in all respects.

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By way of summary, we hold:

(1) That AGVA by its pleadings and trial tactics assumed responsibility for the activities resulting in the contractual interference action and that it did not fairly raise the issue that such activities were not participated in, authorized by or ratified by it, and hence we hold that § 6 of the Norris-LaGuardia Act has no controlling effect upon the decision of this case.

(2) We discern no inconsistency between our prior opinion and the Supreme Court opinion in *Gibbs*.

(3) We re-adopt and re-affirm in all respects our prior opinion, reported at 349 F.2d 975, and on plaintiff's appeal we reverse the judgment of the trial court sustaining defendant's motion for judgment n.o.v. on the contractual interference claim and remand the case to the district court with direction to reinstate the verdict and enter judgment thereon. We adhere to our holding that the court erred in dismissing the secondary boycott cause of action but hold no prejudice resulted thereby as plaintiff sought and recovered the same damages in the contractual interference action. Upon defendant's cross-appeal, we affirm the trial court's order conditionally denying AGVA's alternate motion for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 17856 William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus, Appellant, vs. American Guild of Variety Artists.	Appeal from the United States District Court for the District of Minnesota.
No. 17857 American Guild of Variety Artists, Appellant, vs. William Smith, doing business as Smith Entertainment Agency and as Smith & Dale Circus.	Appeal from the United States District Court for the District of Minnesota.

Petition of appellant/appellee American Guild of Variety Artists for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

December 13, 1966.

MAY 15 1967
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1966

1250

AMERICAN GUILD OF VARIETY ARTISTS,
Petitioner,

vs.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN GUILD OF VARIETY ARTISTS,

Petitioner,

vs.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUMMARY STATEMENT OF FACTS

Respondent, William Smith, 58, started in the carnival business at 14 and continued to 1956. In 1957 he began producing shows for county fairs using circus acts. His shows increased in size until 1961. In 1961 he began booking larger and better fairs for 1962. His efforts culminated in contracts with 17 of the fair boards of the larger fairs in the five states of Minnesota, Wisconsin, Iowa, South Dakota and Michigan, beginning on July 28, 1962, at Faribault, Minnesota, and playing almost continuously (less travel time) and ending September 1, 1962, at Onekama, Michigan. For this run of shows Mr. Smith engaged A.G.V.A. Union performers on Union contracts. Prior to this run he had taken a circus for a tour of Canada and Alaska. Smith left the show at Edson, Canada, claiming one of the performers, Stebbing, had stolen the show (T. 329-332). When he left he owed the performers

approximately $9,000.00 (T. 303). Most of the performers in the Canadian tour were also on separate contracts to perform on the summer tour commencing at Faribault.

On July 17, 1962, a meeting was held by the A.G.V.A. executive committee. No notice of the meeting was given Smith. At the meeting it was recommended Smith be placed on the unfair list (T. 1014; 1020). Herb Meyers, Minneapolis Branch Manager, sent Mr. Smith a telegram July 20, 1962, notifying him he was on the unfair list for nonpayment of salaries due its members (T. 49). Meyers did not have authority to place a producer (Smith) on the unfair list (T. 1021). This had to come from the national headquarters of A.G.V.A. A letter to this effect was not sent by national headquarters until July 30, 1962, after the Faribault fair (T. 1021).

In the meantime, on July 20, 1962, Mr. Meyers contacted the treasurer and secretary of the Faribault fair board by phone and ordered them to cancel Smith's contract and, when they protested they had a contract with Smith, were told it was void. To their protests that they had to have a show, he told them "they" would take over the contract and put on the same show (T. 445-447; 511-512).

At a meeting with the fair board arranged for the following Monday by Mr. Meyers, he (Meyers) again demanded the fair board cancel its contract with Smith. When members of the fair board protested that they had no grounds to cancel Smith's contract they were told it was void. To prove this point, Meyers placed a phone call to the national office in New York, allowing a member of the fair board to listen while he obtained from the Midwest Regional Director a "legal opinion" that the fair board could cancel its contract with Smith (T. 518). He (Meyers) further told the fair board Smith was gone and his whereabouts unknown and that he could not and would not produce a show and said,

"We're going to take over the contract" (T. 450), and negotiated for the contract, demanding a guaranty. Smith later appeared at this meeting.

At another meeting Monday night at which the fair board informed Meyers that it had been decided to honor Smith's contract, Mr. Meyers said, "You leave me no alternative but to picket your fair" (T. 456), and Meyers agreed this was his intent (T. 1041).

Meyers then sent telegrams to the other 16 fair boards informing them Smith was on the unfair list and contacted at least nine secretaries of the fair boards by phone (T. 748).

Many of the Union performers came to Faribault to work for Smith (T. 342; 412; 1099). Picketing was begun Thursday morning, July 26, 1962, and continued to 10:00 or 11:00 P.M. that night, picketing a thrill show of no connection with Smith (T. 459). They also picketed Friday during other shows having no connection with Smith. On Saturday they picketed in the morning and afternoon. Saturday afternoon the Smith show played and immediately afterward his contract was cancelled and he left the grounds.

After cancellation of Smith's contract the Union again tried to take over his contract. The fair board refused (T. 530; 552; 469). The Union had promised the pickets they would take over Smith's contracts and, if the performers wanted to work, they should stick with the Union (T. 1101).

Many times during the week of the fair, Meyers and Stebbing approached fair board members about putting on the show in Smith's stead (T. 524; 526). The pickets carried misleading signs (T. 546).

Although Smith's show had been cancelled and he had left, the pickets continued Saturday night and Sunday. On Saturday night several of the members of Smith's troupe, who wished to go home, were so frightened by threats from pickets that they remained in the grandstand until 2:00 A.M.

Sunday morning (T. 759; 570; 574; 582; 765). During the fair, other performers were threatened: helicopter pilot John Clark (T. 633; 655), trapeze girl Yvonne Stevens (T. 720; 743). The secretary of the Faribault fair board and mayor of Faribault, Frank Duncan, was also threatened. Mr. Duncan asked for police protection (T. 531). Other threats were made and the fair board took special precautions (T. 531; 588).

Smith's remaining performers quit when the Faribault contract was cancelled. Thereafter many of these acts played fairs with whom Smith had contracts (T. 621; 591; 593).

Thereafter, with the exception of two weeks, respondent Smith was without employment up to the time of trial (T. 92).

ARGUMENT

SECTION 6 OF THE NORRIS-LaGUARDIA ACT NOT TO BE CONSIDERED AT THIS TIME

Since this defense has not been heretofore raised, can the appellate court consider this issue at this time?

This issue cannot be raised at this time. According to the general rule, issues not raised in the trial court may not be raised in the appellate courts.

Sisco v. McNutt, et al., 209 F.2d 550, was a case in which plaintiffs had sued defendant Sisco, a labor union officer, for injuries received as a result of an alleged conspiracy between plaintiffs' assailants and Sisco. Sisco for the first time raised the issue of 29 *U.S.C.A.* 106 (Sec. 6 of the Norris-LaGuardia Act) on appeal. This Court said:

> "The question of the applicability of Section 6 of the Norris-LaGuardia Act to this case was never raised or even mentioned in the District Court at any time. Assuming the pertinence of the section to this case, which concededly had its roots in a labor dispute and involved

the liability of Sisco, an officer of a labor union, to the plaintiffs for injuries actually inflicted by Sisco's associates, who were members of the union, the section did not deprive the District Court of jurisdiction to try this action. Section 6 is either a rule of evidence or one changing the substantive law of agency. *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395, 403, 67 S.Ct. 775, 91 L.Ed. 973.

"This Court is a court of review and not a court for the retrial of cases. It is only in exceptional cases that questions of law not presented to or passed upon by the trial court will be reviewed. *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996, and cases cited; *Trapp v. Metropolitan Life Ins. Co.* (8 Cir.), 70 F.2d 976, 981; *Helvering v. Hormel* (8 Cir.), 111 F.2d 1, 5, affirmed 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037. The general and almost invariable rule is that questions not called to the attention of or ruled upon by a trial court will not be reviewed on appeal. *Goldie v. Cox* (8 Cir.), 130 F.2d 695, 715; *Zuckerman v. McCulley* (8 Cir.), 170 F.2d 1015, 1018; *Hoyt v. Clancey* (8 Cir.), 180 F.2d 152, 154. It is safe to say that this rule should be adhered to except 'where the obvious result would be a plain miscarriage of justice.' *Hormel v. Helvering,* 312 U.S. 552, 558, 61 S.Ct. 719, 772, 85 L.Ed. 1037. The application of the rule in this case will not produce a plain miscarriage of justice. A departure from the rule would not be justified. The defendant had his full day in court. Having made no objections to the legal theory upon which the issue of his liability was submitted to the jury, either by asking for instructions or taking exceptions to the instructions given, he is in no position to assert that the District Court comitted prejudicial error in not submitting the case upon a different theory."

Other cases following this general rule are as follows:

Defenses in avoidance of a claim made in a declaration must be proved in a court of original jurisdiction and if not proved there, they cannot be successfully set up in the appellate court to support an assignment of error.

Merchants' Mutual Ins. Co. v. Baring Bros. & Co., 87 U.S. 157, 20 Wall. 159.

Plaintiffs in error could not complain that the Circuit Court did not give effect to a defense which they did not think it worthwhile to plead.

Potter v. U. S., 1 S.Ct. 524, 107 U.S. 126 (1882, Minn.).

Issues or questions not raised in or presented to trial court will not be considered in reviewing court.

DeWolf v. Raband, 26 S.Ct. 475, 201 U.S. 371 (1906).

Becker Co. v. Cummings, 36 S.Ct. 15, 296 U.S. 74 (1935).

Ground of defense not urged in trial court may not be urged on appeal.

U. S. v. LeBaron, 60 U.S. 73, 19 How. 73 (1856).

The Supreme Court will not undertake to review what the Court below did not decide.

Walters v. City of St. Louis, Missouri, 74 S.Ct. 505, 347 U.S. 231.

A point raised for the first time before the Supreme Court would not be considered.

Woods v. Lawrence County, 66 S.Ct. 393, 326 U.S. 638.

See also:

Sliver v. Shelback (1786), 1 U.S. 165, 1 L.Ed. 84.

Houghton v. Jones (1863), 68 U.S. 702, 1 Wall. 707.

Chicago & E. I. R. Co. v. Southern Ry. Co. (C.A. Ind. 1959), 261 F.2d 394.

Stanley v. U. S. (6 Cir. 1957), 245 F.2d 427.

Topey v. Red Owl Stores (8 Cir. 1955), 228 F.2d 117.

As pointed out by the Circuit Court in its decision in the instant case, the A.G.V.A., as a matter of trial strategy,

avoided the Section 6 issue. Are they now to be heard to claim prejudice because of their own omission?

APPLICABILITY OF DEFENSE OF 29 U.S.C. §106 TO FACTS OF THIS CASE

The overwhelming authority heretofore cited shows the defense of 29 *U.S.C.* §106 is not applicable to the facts of this case. It should be further pointed out that two jury verdicts in this case have held that the appellees were not involved in a bona fide labor dispute but were, in effect, attempting to appropriate appellant's contracts and put him out of business. The Union had no lawful objective. Since the Union had no lawful objective it is not entitled to rely upon a federal act passed for the protection of those involved in bona fide labor disputes. The Union should not be allowed to use the Norris-LaGuardia Act as a weapon to accomplish an illegal purpose. There was no "labor dispute" within the meaning of the Norris-LaGuardia Act as the Union activity was not intended to bring about a legitimate Union goal. The testimony was so strong on this point that it is beyond dispute. See Transcript, pages 451, 518, 519, 339, 524, 526, 530, 552, 511, 515, 707.

The facts show that Herb Meyers, the Regional Agent, was responsible for most of the acts or illegal activities of the Union. He communicated with the national office in New York by telephone and, while a fair board member was listening, asked the Midwest Regional Director whether the fair board had a right to cancel Smith's contract. The Midwest Regional Director informed Meyers and the fair board member that Smith's contract was not valid and they could break it (see Transcript, pages 454, 517, 1037).

Herb Meyers also contacted the national office by phone and obtained authority to put plaintiff on the unfair list (see Transcript, page 964).

The national Union also later placed the Faribault fair board on the unfair list (Transcript, page 542).

According to appellant Union's witnesses' testimony, the national board of the Union or its national executive committee are the only groups authorized to place someone on the unfair list (Transcript, page 937). Herb Meyers testified that "The national office told me that under no circumstances would they allow this fair to go on under Smith's jurisdiction" (Transcript, page 978). Stebbing, one of the Union actors and pickets, said, "Anything serious, we always telephoned the New York office" (Transcript, page 848).

VIOLENCE AND THREATS OF VIOLENCE

There is no doubt that Section 8(b)(1) is not the exclusive method of controlling threats, coercion, and violence against employees by labor unions as pointed out by the Circuit Court in its decision of August 9, 1965 (349 F.2d 975), in the instant case. This is further substantiated by the *Gibbs* case:

> "This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by passage of federal labor legislation." (Citing cases.) *U.M.W. v. Gibbs,* 86 S.Ct. 1130, 1140.

The Circuit Court in its first decision in the instant case (349 F.2d 975) set out in some detail the threats and coercion by Meyers and other pickets and the effect that this had on the fair board, the circus and Smith and the relations of Smith with the fair board and his performers.

Petitioner in its brief describes the Union activities as peaceful, although these activities caused the Mayor of Faribault to obtain additional police protection for the fair generally (T. 531) and himself, particularly (T. 531, 550), when he received a threat to his life, and caused several performers to remain in the grandstand for several hours Saturday night

until 2:00 A.M. Sunday morning, afraid to leave while the threatening pickets remained (T. 563, 570, 574, 582, 759, 765). These "peaceful" activities further caused several performers, union and non-union, who went to Faribault to work for Smith, to leave without working. The helicopter pilot, John Clark, said he was frightened by Meyers (T. 654). That Meyers told him that he "was not going to haul the trapeze act and that he had some people that would see to it that I would not haul it" (T. 655).

The whole atmosphere at Faribault during the fair was one of fear and tension and there were threats of bus loads of people coming in to "take care of the situation." The Civil Defense Police Force was alerted as well as the regular Faribault police (T. 531).

The *Gibbs* case was characterized by one day of violence followed by months of peaceful picketing, while in the instant case tension and threats of violence were mounting. As pointed out by Faribault's Mayor Duncan, the fair board was of the opinion that Sunday (the final day of the fair) was the day they expected an eruption of violence (T. 531-32).

As the Circuit Court said in its first opinion in the instant case after citing numerous instances of threats:

> "The evidence here would support a finding that the union's activities went well beyond peaceful primary picketing. There is substantial evidence of threats of physical harm made by Meyers and other pickets to non-union employees and fair officials which placed them in fear for their safety. When Smith's union employees went on strike, he employed non-union actors to put on the show. There is substantial evidence from which the jury could find that the defendant threatened and coerced such non-union actors with the result that some refused to perform and the performance of others was impaired. An inference could be drawn that the sub-standard performance could be attributed to threats made by the pickets. Moreover, the Secretary of the fair testified that Meyers told him the dog man was pretty

mad and that 'he would hate to be in my shoes because I might not be living tomorrow.'

"The fair board found it to be necessary to arrange for additional police protection." *Smith v. A.G.V.A.* (C.A. 8, 1965), 349 F.2d 975, at page 983.

The Circuit Court then also pointed out that this plaintiff presented evidence that the inferior performance and difficulty at Faribault caused cancellation of the sixteen other contracts and that even Judge Larson (the trial judge), in his opinion, said: "If there was liability for defendant's actions in Faribault, we fail to see how liability could end there." This issue was presented to the jury and the jury found for plaintiff.

UNION OBJECTIVES UNLAWFUL

Instruction 5, given by Judge Larson, deals with the crux of the union activity. This instruction reads as follows:

"5. Placing the plaintiff on an unfair list, notifying the various Fair Boards of this fact, and picketing are justifiable interferences, and if you find that the purpose motivating these actions by the defendant was the furtherance of its own interest in protecting its members, you should find for the defendant. To find for the plaintiff's motives were more than a furthering of its interest as a labor union, and that it intended without just cause to harm the plaintiff by destroying his business or appropriating his contracts."

For the jury to render a verdict for the plaintiff under this instruction the jury had to find either that the Union actually intended and its actual purpose in its activities was to put plaintiff out of business or to actually enter the entertainment business and take over his contracts to play the various fair boards. Yet, the verdict for the plaintiff confirms that defendant Union was actually guilty of such illegal and bizarre activity.

The courts have long held that a Union cannot claim a right to picket even peacefully, under the First Amendment, where the Union has an unlawful objective. See *Burke v. Downey* (1960), 197 N.Y. Supp.2d 89, 22 Misc.2d 911; *U. S. v. Petrillo* (D.C. Ill., 1946), 68 F.Supp. 845, reversed on other grounds, 67 S.Ct. 1538, 332 U.S. 1, 91 L.Ed. 1877; *Print. Spec. Loc. 388 A.F.L. v. LeBaron* (C.A. Calif. 1949), 171 F.2d 331, Cert. Den. 69 S.Ct. 884, 336 U.S. 953; *N.L.R.B. v. Perfect Circle Co.* (C.C.A. 7, 1946), 162 F.2d 566.

Not all concerted activities may be labeled as protected by Sec. 7 of the Act, but only those activities which are legal or lawful in the first instance. *N.L.R.B. v. Dallas Gen'l Drivers, etc., Loc. 745* (5 Cir.), 264 F.2d 642, 646; *Coop. Ref. Assn. v. Williams* (1959), 345 P.2d 709.

There is little doubt that the instant case also affords respondent protection from the alleged defense of peaceful picketing.

It is also well settled that an activity not protected by Sec. 7 or prohibited by Sec. 8, that is not arguably subject to Sec. 7 or Sec. 8 of the Act, and which does not operate to frustrate the purpose of the Act, is a valid state issue, triable in state or federal courts. *Ex Parte George,* 358 S.W.2d 590; *Local 20 Teamsters v. Morton,* 377 U.S. 252, 12 L.Ed.2d 280, 84 S.Ct. 1253.

CONCLUSION

The only question for consideration by this Court is whether the judgment by the Circuit Court is inconsistent with this Court's opinion in the *Gibbs* case, and, if it is not, there is no reason to disturb the judgment. *Steinfeld, et al., v. Zeckendorf, et al.*, 36 S.Ct. 14, 239 U.S. 26.

We submit that the Circuit Court has re-examined its prior decision in light of the *Gibbs* case and found its decision consistent. This judgment should not be disturbed.

We therefore submit the petition should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAY 15 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1250

AMERICAN GUILD OF VARIETY ARTISTS,
Petitioner,

against

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,
Respondent.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1250

AMERICAN GUILD OF VARIETY ARTISTS,

Petitioner,

against

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,

Respondent.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

POINT I

Section 6 of the Norris-La Guardia Act may be considered at this time.

Respondent's contention in his brief in opposition to this petition for writ of certiorari that Section 6 of the Norris La Guardia Act has not been raised below and cannot be raised at this time is without merit. The Supreme Court of the United States in its order of reversal and remand in this very case 384 U.S. 30 (1966) itself, on its own initiative, raised the question of the application of that statute when it stated:

> "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated

> and the case is remanded to that Court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, No. 243, October Term, 1965, decided March 28, 1966."

In *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1940), the Supreme Court stated:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

The *Gibbs* case was decided March 28, 1966, after the judgment of the United States Court of Appeals for the Eighth Circuit was entered (August, 1965) reversing the judgment of the United States District Court for the District of Minnesota (which directed a verdict in favor of petitioner on one cause of action and granted judgment N.O.V. for the petitioner on a second cause of action.)

It has been held by the Supreme Court in the past that questions of law not raised in a lower court may nevertheless be raised on appeal where an intervening statute or judicial decision has come between a final judgment in a lower Federal Court and the review of that decision by this Court. *United States* v. *The Schooner Peggy*, 1 Cranch 103; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U.S. 503.

When the Supreme Court asked the United States Court of Appeals for the Eighth Circuit to consider this case in the light of the *Gibbs* case, it necessarily *held* that 29 U.S.C. § 106 can be brought into this case on appeal.

POINT II

The United States Court of Appeals for the Eighth Circuit substantially ignored Part II of the opinion in the *Gibbs* case.

In petitioner's brief in support of its petition for writ of certiorari, it is pointed out rather clearly that the United States Court of Appeals for the Eighth Circuit in its decision on remand from this Court ignored a compelling mandate of this Court set forth in *Gibbs*; namely, that the scope of state remedies in area of labor law is pre-empted by federal labor legislation and for a state to rise above federal pre-emption of this field of labor law, action inimical to the state's interest must be clearly present and that action is violence. In the instant case, as in *Gibbs*, violence or threat of violence was practically non-existent and clearly not of a degree as to bring into play state remedies in this pre-empted area of law.

Conclusion

Section 6 of the Norris La Guardia Act, 29 U.S.C. § 106, is a yardstick by which evidence presented in cases involving labor disputes may be measured either by the trial court or the appellate court, it is not an affirmative defense, but a rule of evidentiary law which maintains throughout the case and may be raised at any time. The violence attendant to the picketing in the instant case was totally non-existent so that state remedies cannot be invoked.

The Eighth Circuit Court of Appeals erred in holding that Section 6 of the Norris La Guardia Act, 29 U.S.C. § 106, could not be raised on appeal and it erred in not reviewing and applying the tests for the invocation of state remedies set forth in Part II of the *Gibbs* case.

I therefore submit that the petition should be granted.

Respectfully submitted,

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